Intervention

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Abstract Nicaragua's cases brought a great contribution to the law on intervention. They clarified some of its characteristics, the most important of which relating to the statutory nature of intervention: thus, the admissibility of these proceedings is not dependent upon the consent of the Parties, but on the fulfilment of the conditions established by the Statute. Though the Court took many years to acknowledge this fundamental aspect, its case-law seems now stabilized—at least as a matter of principle. The same cannot be said about the substantive conditions for admissibility of intervention: absent any real attempt from the Court to define the concept of 'interest of a legal nature which may be affected', the admission of intervention under Article 62 is still highly circumstantial. These ambiguities also durably impacted the consequences of intervention. The Court firmly maintains a peremptory distinction between intervention as a party and intervention as a non-party, but it also deprives it of any prospect of clarification, since it has never admitted intervention as a party. This emphatic insistence does not help clarifying the status of the intervener, nor does it stimulate the reflection upon its procedural rights and obligations.

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1 Introduction

'Not really a third, certainly not a party': this could resume the ICJ's approach to third-party intervention in contentious proceedings. Thus, though the Court recognized that bilateral disputes could interfere with the legal interests of States other than the applicant and the respondent, it nonetheless considerably restricted these States' access to its jurisdiction. Nicaragua's cases involving intervention illustrate this paradox.

There are three relevant cases. Nicaragua was intervener in one of them, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*,[1] and the applicant in two other, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)*[2] and *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*.[3] Nicaragua's intervention in *El Salvador/Honduras* was the first intervention to be admitted by the Court (in fact a Chamber) under Article 62 of the Statute, and that decision was adopted despite opposition by the parties. As a party, Nicaragua did not favour much the applications for permission to intervene.[4] The requests were eventually rejected: it was the case for El

[1] See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, ICJ Reports 1990,* p. 92 (hereinafter '*El Salvador/Honduras* (Application by Nicaragua to Intervene)').

[2] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984,* p. 215 (hereinafter '*Nicaragua* v. *United States of America* (Declaration of Intervention by El Salvador)').

[3] See *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Costa Rica for Permission to Intervene, Judgment, ICJ Reports 2011*, p. 348 (hereinafter '*Nicaragua* v. *Colombia* (Application by Costa Rica to Intervene)') and *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene of Honduras, Judgment, ICJ Reports 2011*, p. 420 (hereinafter '*Nicaragua* v. *Colombia* (Application by Honduras to Intervene)').

[4] Nicaragua's position was to call the Court's attention to some deficiencies in the applications for permission to intervene, leaving it to the Court to appreciate whether the statutory conditions for admissibility were met (Written Observations on the Declaration of Intervention (Nicaragua) in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, 10 September 1984, para 1; *Written Observations of the Republic of Nicaragua on the Application for Permission to Intervene by the government of Costa Rica*, 26 May 2010, para 41 and *Written Observations of the Republic of Nicaragua on the Application for Permission to Intervene Filed by the Republic of Honduras*, 26 May 2010, para 41).

Salvador in *Nicaragua* v. *United States* as well as for Honduras' and Costa Rica's in *Nicaragua* v. *Colombia*.

On the overall, Nicaragua's cases only confirm the Court's reluctance to open the door to third States through these incidental proceeding. Thus, though the ICJ's jurisdiction on intervention is statutory, in the sense that it does not depend on the consent of the Parties, but on the fulfilment of the conditions for admissibility set out in the Statute and in the Rules, the Court's attitude is restrictive and excessively prudential. The Court appreciated quite restrictively the conditions for the admissibility of intervention set out by its own case-law, even in cases where the Parties did not object.[5] This prudence is encouraged by the Rules of the Court, which seek to preserve the balance between the autonomy of the Parties (and the principle of consent) and the integrity of the dispute entrusted to the Court. This is apparent in Article 84 of the Rules which provides for systematic preliminary proceedings (oral and/or written) for dealing with the admissibility of the application for permission to intervene, regardless of whether it was made under Article 62 or 63 of the Statute.[6]

This being said, the Court's case-law on intervention does not leave a great impression of coherence: rigidity is followed by relaxation which is yet again followed by rigidity.[7] Of course, each application is judged on its own merits. However, the Court has done little to tame the diversity and systemize the conditions for intervention, the difference of appreciation of similar situations being particularly perceptible in maritime delimitation cases.

These variations are essentially due to the duality of the functions of intervention. The procedure is perceived as both protective/preventive and informative: protective for the non-parties whose legal interests may be at stake; informative for

[5] See also *Nicaragua* v. *Colombia* (Application by Honduras to Intervene), *supra* note 3, Dissenting Opinion of Judge Donoghue, p. 485, paras 37–38.

[6] Article 84, paragraph 2 of the Rules provides for a right to oral hearings on the admissibility of intervention in case of an objection of one of the parties. In this case, the Court decides by a judgment. Absent any objection, the Court decides of the admissibility of intervention by an order.

[7] In 1990, the acceptance of Nicaragua's intervention in El Salvador/Honduras was preceded by two judgements rejecting Malta's Application for permission to intervene in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment of 14 April 1981) (hereinafter '*Tunisia/Libya* (Application by Malta to Intervene)') and Italy's Application in *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment of 21 March 1984) (hereinafter '*Libya/Malta* (Application by Italy to Intervene)'). In 1994, the Court accepted Equatorial Guinea's application for permission to intervene in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*. However, Costa Rica's and Honduras applications were denied in 2011, while, the same year, Greece's request was admitted in *Jurisdictional Immunities of the State (Germany* v. *Italy)* (*Order of 4 July 2011, ICJ Reports 2011*, p. (hereinafter '*Jurisdictional Immunities* (Application by Greece to Intervene)')). In 2013, the Court acceded to New Zealand's request to intervene in *Whaling in the Antarctic (Australia* v. *Japan)* (*Order of 6 February 2013, ICJ Reports 2013*, p. 3 (hereinafter '*Whaling* (Declaration of Intervention by New Zealand)')), but, to the difference of the previous cases, this one was based on Article 63 of the Statute.

the Court on aspects of law and fact before it.[8] The informative function disturbs the Court's main mission which, in contentious proceedings, is 'to resolve existing disputes between States'.[9] At times, the Court even insisted that 'the requests that parties submit to the Court [. . .] must [. . .] always relate to the function of deciding disputes'.[10] By contrast, the applications for permission to intervene must not aim at deciding disputes, quite the contrary.[11] Their informative purposes relate more to the second aspect of the Court's 'normal judicial function [which is to ascertain] the existence or otherwise of legal principles and rules',[12] the particularity of intervention being that this concerns not only abstract rules of general application, but also 'the nature of the legal rights'[13] of the would-be intervener. In its most recent cases, the Court appears to have favoured the informative function.

A further source of complexity stems from the fact that this duality of functions does not correspond to the types of intervention established by the Statute of the Court. On a superficial reading, Article 63 would be the gateway for the informative function, since it grants 'the right to intervene' to parties to a convention whose construction is *sub judice*.[14] Article 62, on the other hand, would mainly relate to the protective function, since it recognizes the possibility to intervene to a third State having 'an interest of a legal nature which may be affected by the decision in the case'. In the judgment rejecting Costa Rica's request for intervention in the *Nicaragua* v. *Colombia* case, the Court expressly endorsed the terminology and seemed to adhere to the underlying philosophy:

[8]This distinction appears in Sir Ian's pleadings in the *El Salvador/Honduras* case: 'In the submission of Nicaragua, the protective function is not to be equated with the informative or prescriptive function of intervention characterized [. . .] as being concerned with ensuring 'the sound administration of justice'. The protective function complements the informative function but provides the intervening State with the opportunity to explain the legitimate interests of the intervener which are placed in issue by the litigation between the Parties. The function of protection involves a consideration of the objectives of the litigants and the precise modes in which those objectives may affect the legal entitlements of the intervening State.' (Verbatim, 7 June 1991, C 4/CR 91/43 p. 46 (Ian Brownlie)). The terminology 'protective/ informative function' was taken up by the doctrine (e.g.: Forlati 2014, p. 190).

[9]*Frontier Dispute (Burkina Faso/Niger)*, *Judgment, ICJ Reports 2013*, p. 70, para 48 quoting *Nuclear Tests (Australia* v. *France), Judgment, ICJ Reports 1974*, pp. 270–271, para 55; *Nuclear Tests (New Zealand* v. *France), Judgment, ICJ Reports 1974*, p. 476, para 58.

[10]*Ibid.*

[11]See Sect. 3.2.1 below.

[12]*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p. 237, para 18.

[13]*El Salvador/Honduras* (Application by Nicaragua to Intervene), *supra* note 1, p. 130, para 90.

[14]'[I]n accordance with the terms of Article 63 of the Statute, the limited object of the intervention is to allow a third State not party to the proceedings, but party to a convention whose construction is in question in those proceedings, to present to the Court its observations on the construction of that convention' (*Whaling* (Declaration of Intervention by New Zealand), *supra* note 7, p. 5, para 8).

> The decision of the Court granting permission to intervene can be understood as a *preventive* one, since it is aimed at allowing the intervening State to take part in the main proceedings in order to *protect* an interest of a legal nature which risks being affected in those proceedings.[15]

However, the requests for intervention[16] and the Court's decisions on their admissibility entertain a jumble of the functions of intervention. Thus, the informative purposes have become preponderant even under Article 62. Already in *El Salvador*/*Honduras*, the Chamber found that:

> [I]t is perfectly proper, and indeed the *purpose* of intervention, for an intervener to *inform* the Chamber of what it regards as its rights or interests, in order to ensure that no legal interest may be 'affected' without the intervener being heard.[17]

And in *Nicaragua* v. *Colombia*, the Court found that the mere fact of being informed of the legal interests at stake tends to perform the protective function:

> The precise object of the request to intervene certainly consists in *informing* the Court of the interest of a legal nature which may be affected by its decision in the dispute between Nicaragua and Colombia, but the request is also aimed at *protecting* that interest.[18]

Nicaragua's cases involving intervention must be assessed against this background. Of course, they cannot be analysed in isolation from the other decisions relating to this proceeding, but the present paper will focus on the clarifications brought by them, but also on the uncertainties and confusions they perpetuated or even created.

The main clarification relates to the statutory nature of intervention: its admissibility is not dependent upon the consent of the Parties, but rather on the fulfilment of the conditions established by the Statute. Though the Court took many years to acknowledge this fundamental aspect, its case-law seems now stabilized—at least as a matter of principle (1). The ambiguities as to the functions of intervention have however left a durable imprint on the conditions for admissibility: absent any real attempt from the Court to define the concept of 'interest of a legal nature which may be affected', the admission of intervention under Article 62 remains highly circumstantial (2). These ambiguities also durably impacted the consequences of intervention. The Court firmly maintains a peremptory distinction between intervention as a party and intervention as a non-party, but it also deprives it of any prospect of clarification, since it has never admitted intervention as a party. However, this emphatic insistence does not help clarifying the status of the intervener, nor does it stimulate the reflection upon its procedural rights and obligations (3).

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[15] *Nicaragua* v. *Colombia* (Application by Costa Rica to Intervene), *supra* note 3, p. 359, para 27—italics added.

[16] The phrase 'request for intervention' is used to encompass both the 'application for permission to intervene' under Article 62 of the Statute and 'the declaration of intervention' under Article 63.

[17] *El Salvador*/*Honduras* (Application by Nicaragua to Intervene), *supra* note 1, p. 130, para 90—italics added.

[18] *Nicaragua* v. *Colombia* (Application by Costa Rica to Intervene), *supra* note 3, p. 360, para 33—italics added.

2 Trial and Error in Establishing Statutory Jurisdiction Over Intervention

There are too few certainties surrounding intervention not to highlight them from the outset. First, intervention is an incidental proceeding: El Salvador's application to intervene in *Nicaragua* v. *United States* set it out clearly (Sect. 2.1). Second, Nicaragua's application for intervention in the case *El Salvador/Honduras* allowed the Court to establish that this type of jurisdiction is not based on the principle of consent, but on statutory provisions (Sect. 2.2). It falls therefore upon the Court to appreciate the admissibility of the request, in light of the conditions set out in the Statute and the Rules. However, its margins of appreciation are different under Articles 62 and 63 of the Statute (Sect. 2.3).

2.1 Intervention as an Incidental Proceeding

Intervention is an incidental proceeding which comes within the purview of a principal case. This characteristic was recognized from the outset, though the consequences arising from it have been detailed in time. El Salvador's attempt to intervene in *Nicaragua* v. *United States* raised the question whether intervention could relate to another incidental proceeding (such as preliminary objections). Since El Salvador's application raised numerous issues relating to the substance of the case, the Court considered it to be premature:

> [T]he Declaration of Intervention of the Republic of El Salvador, which relates to the present phase of the proceedings, addresses itself also in effect to matters, including the construction of conventions, which presuppose that the Court has jurisdiction to entertain the dispute.[19]

The Court reached this conclusion in relation to a declaration of intervention made under Article 63 of the Statute (El Salvador filed its declaration with respect to the construction of certain provisions of the Charter of the United Nations). The same conclusion would necessarily apply to intervention under Article 62, in respect to which the Court enjoys a larger margin of appreciation.[20]

[19] *Nicaragua* v. *United States of America* (Declaration of Intervention by El Salvador), *supra* note 2, p. 216. Here the Court clarified and confirmed a stance already announced in *Haya de la Tore* case ('every intervention is incidental to the proceedings in a case'—*ICJ Reports* 1951, p. 76) and in 'the *Nuclear Tests* case, where [. . .] the ICJ deferred consideration of Fiji's request to intervene until it had pronounced on France's objections to jurisdiction and admissibility' (Miron and Chinkin 2018, p. 1344). Ultimately the Court found that 'the claim of New Zealand no longer has any object and that the Court is therefore not called upon to give a decision thereon; [. . .] in consequence there will no longer be any proceedings before the Court to which the Application for permission to intervene could relate' (*Nuclear Tests (New Zealand* v. *France), Application by Fiji for Permission to Intervene, Orders of 20 December 1974, ICJ Reports 1974*, p. 535).

[20] See Sect. 2.3 below.

Nicaragua's application to intervene in *El Salvador/Honduras* emphasised another consequence of the incidental character of intervention. The case had been submitted by *compromis* to a Chamber of the Court. Nicaragua contended that it was up to the full Court to pronounce upon the admissibility of its request to intervene made under Article 62 of the Statute. In a preliminary order, the full Court rejected Nicaragua's claim, insisting that:

> the rule of law that 'every intervention is incidental to the proceedings in a case' [...], applies equally whether the intervention is based upon Article 62 or Article 63 of the Statute.[21]

Consequently,

> it is for the tribunal seised of a principal issue to deal also with any issue subsidiary thereto; whereas a chamber formed to deal with a particular case therefore deals not only with the merits of the case, but also with incidental proceedings arising in that case.[22]

The Chamber's judgment on the admissibility of Nicaragua's application for permission to intervene also insists upon the incidental nature of the proceedings:

> It is noteworthy that intervention is dealt with in Chapter III of the Court's Statute, which is headed "Procedure". This approach was adopted by the Court also when it drew up and revised its Rules of Court, where intervention appears in Section D of the Rules, headed "Incidental Proceedings". *Incidental proceedings by definition must be those which are incidental to a case which is already before the Court or Chamber*.[23]

To the difference of the full Court, the Chamber's insistence upon the incidental nature of intervention does not aim at stressing out its own jurisdiction, but gives ground to another exception to the principle of consensual jurisdiction.

2.2 Jurisdiction on Intervention and the Principle of Consent

The Court's prudence in establishing statutory jurisdiction is understandable, considering that 'one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States'.[24] Intervention by a third State in contentious proceedings troubles this founding principle.[25]

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[21] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Order of 28 February 1990, ICJ Reports 1990,* p. 4, quoting *Haya de la Torre, Judgment, ICJ Reports 1951*, p. 76.

[22] *Ibid.*

[23] *El Salvador/Honduras* (Application by Nicaragua to Intervene), *supra* note 1, p. 134, para 98—italics added.

[24] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, ICJ Reports 1998,* p. 324, para 116, quoting *East Timor (Portugal* v. *Australia), Judgment, ICJ Reports 1995,* p. 101, para 26.

[25] *El Salvador/Honduras* (Application by Nicaragua to Intervene), *supra* note 1, p. 133, para 99; see also *Libya/Malta* (Application by Italy to Intervene), *supra* note 7, p. 22, para 35.

This tension with the principle of consent is less visible under Article 63 of the Statute, whose rationale is 'to foster uniform interpretation of a convention and thus to promote the harmonious development of international law'.[26] Article 63 of the Statute reflects the idea that parties to multilateral conventions remain their authentic interpreters, even when the World Court is called to give their judicial interpretation. Consequently, the would-be intervener must take an objective stand, and should not address questions of fact or advance any particular claims. In this way, the autonomy of the Parties and of the dispute submitted to the Court stands unaffected.[27]

By contrast, Article 62, with its requirement of an 'interest of a legal nature which may be affected', imposes on the would-be intervener a duty to address questions of law and fact[28] and, on the Court, to analyse the request '*in concreto* and in relation to all the circumstances of a particular case'.[29] This brings intervention dangerously close to judicial settlement of disputes, for which States' consent is indeed required. The Court's role was to maintain the distance between them. This was indeed a tightrope walking exercise: at first, the Court seemed to decide between the conflicting views expressed ever since the adoption of the PCIJ's Statute, by introducing, on the occasion of the 1978 revision of the Rules, a reference to the 'basis of jurisdiction' in Article 81, paragraph 2 (c):

> The application [for permission to intervene under Article 62 of the Statute] [. . .] shall set out [. . .] any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case.[30]

The 1978 Rules (still in force) seemed thus to favour the view that intervention should be based on consent. But this creeping amendment of the Statute met with critics expressed both in the judges' opinions[31] and in doctrinal writings.[32] To be sure, 'the language is open-ended and non-committal'.[33] However, the principle of

[26]Miron and Chinkin (2018), p. 1370.

[27]This does not mean that intervention under Article 63 is not disruptive of the equality of the Parties (see Sect. 4 below).

[28]The general interest in the interpretation of treaties is not enough for the purposes of Article 62 (see Sect. 3.1.1 below).

[29]*El Salvador/Honduras* (Application by Nicaragua to Intervene), *supra* note 1, p. 117, para 61.

[30]This revision seems to have been prompted by Fiji's request for intervention in the *Nuclear Tests* case. As H. Thirlway reminds, '[t]he cases came to a premature end before the Court was called upon to decide the point, but some of the judges felt strongly enough to indicate, in declarations attached to an Order of the Court, that they would have dismissed the intervention for lack of jurisdiction' (2016, p. 181).

[31]Among the most vigorous and well documented critics is that by Judge Oda (*Libya/Malta* (Application by Italy to Intervene), *supra* note 7, Dissenting Opinion of Judge Oda, pp. 93–99, paras 8–19). For other references, see Miron and Chinkin (2018), pp. 1356–1357).

[32]See references in Miron and Chinkin (2018), p. 1357, footnotes 163–165.

[33]Rosenne (2005), p. 1468.

effet utile requires 'that a provision of this sort [. . .] should [not] be devoid of purport or effect'.[34]

Within this context, Nicaragua's application for permission to intervene in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* was the first when the Court had to take an unambiguous, decisive position on whether intervention is based on consensual jurisdiction (or as the Chamber put it in its judgment it had to resolve 'the vexed question of the "valid link of jurisdiction"').[35] The Chamber boldly set aside the requirement of a jurisdictional link, despite its express mentioning in the Rules of the Court:

> [P]rocedures for a third State to intervene in a case are provided in Articles 62 and 63 of the Court's Statute. The competence of the Court in this matter of intervention is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case, but from the consent given by them, in becoming parties to the Court's Statute, to the Court's exercise of its powers conferred by the Statute. [. . .] The Court has the competence to permit an intervention even though it be opposed by one or both of the parties to the case.[36]

The Chamber's Judgment on the admissibility of Nicaragua's application for permission to intervene brings three important clarifications. To sum up:

- the basis of jurisdiction is not States' consent, but the Statute; thus, intervention is a case of statutory jurisdiction;
- the consent of the Parties to the dispute is not required in order for the application to be admitted; consequently, their objection to intervention is therefore indecisive for the faith of the application;
- this is true both for intervention under Article 62 and Article 63.

Somehow astonished by its own audacity, the Court immediately tempered the statutory jurisdiction by a series of nuances, which gave rise to much confusion on the nature and scope of intervention. First, according to the Chamber, statutory jurisdiction is not entirely disconnected from the principle of consent. On the contrary, the Court insists that the States' consent was given when they became parties to the Statute, and that 'acceptance of the Statute entails acceptance of the competence conferred on the Court by Article 62'.[37] In case of intervention, there is

[34] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, ICJ Reports 1949*, p. 24; see also *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994*, p. 25, para 51.

[35] *El Salvador/Honduras* (Application by Nicaragua to Intervene), *supra* note 1, p. 133, para 94. The phrase 'valid jurisdictional link' is a particularity of intervention proceedings. The phrase as such was cornered in *Tunisia/Libya* (Application by Malta to Intervene), *supra* note 7, p. 20, para 36.

[36] *El Salvador/Honduras* (Application by Nicaragua to Intervene), *supra* note 1, p. 133, para 90; see also *ibid*., para 96.

[37] *Ibid*. In the same vein: 'the competence of the Court or of the Tribunal in these matters does not derive from the consent of the parties to the case to hear and determine the dispute, but from the consent given by them, in becoming parties to the Statute, to the exercise by the Court, or by the Tribunal, the powers conferred upon it by the Statute' (Torres Bernárdez (2006), p. 37).

therefore presumption of consent. This reasoning entails a large part of fiction, considering how unclear the Statute is in relation to intervention. It is only after clarification by the Court that States can take the full measure of their undertakings. As such, this nuance does not trigger practical consequences, but it is however telling of the Court's prudence in establishing statutory jurisdiction.

More troublesome is the Chamber's creation of a new category of intervention, namely intervention as a party, based on parties' consent.[38] This newly-minted taxonomy appears in paragraph 99 of the Judgment on Intervention, and, though regularly reaffirmed, it has never been clarified ever since.[39] This may be the last vestige of the Court's swaying between consensual jurisdiction and statutory jurisdiction with regards to intervention. Regrettably, it is one that caused much confusion on the status of the intervener and on the legal effect of the Court's judgment.

2.3 *The Court's Margin of Discretion for Appreciating the Admissibility of a Request for Intervention*

The difference between jurisdiction and admissibility has not always been clearly articulated. However, in the past years, the Court made an effort to clarify it. An objection to admissibility 'consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein'.[40] In *Djibouti* v. *France*, the Court further clarified the fact that 'in determining the scope of the consent expressed by one of the parties, the Court pronounces on its jurisdiction and not on the admissibility of the application'.[41] Thus, the assessment of jurisdiction aims at establishing the existence and scope of the consent of the parties. In the case of intervention, their ratification of the Statute of the Court disposes of the matter.[42] However, for statutory jurisdiction, the Court has been less keen on consolidating this distinction. For instance, in case of requests for interpretation, the Court considered the

[38] *El Salvador/Honduras* (Application by Nicaragua to Intervene), *supra* note 1, pp. 134–135, para 99.

[39] See also Sect. 4 below.

[40] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections*, Judgment of 17 march 2016, para 48, quoting *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, ICJ Reports 2008*, p. 456, para 120; in the same sense, see *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Merits, Judgment, ICJ Reports 2003*, p. 177, para 29.

[41] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, ICJ Reports* 2008, p. 200, para 48.

[42] See references in footnote 37 above.

conditions in Article 60 of the Statute under the angle of both jurisdiction and admissibility,[43] whereas in analysing the conditions set out in Articles 62 or 63 of the Statute, the Court pronounces solely upon the admissibility of the requests.[44]

This insistence upon the admissibility of the requests to intervene permitted the Court to disconnect intervention from States' consent. This is true not only for the existence of a 'jurisdictional link',[45] but also for the parties' acceptance of or objection to a particular application.

The proceedings on admissibility of intervention allow the parties to express their views as to the fulfilment of statutory conditions, but they do not give them a right to decide of the matter. In fact, the Court departs quite often from the parties' subjective appreciations. Thus, in the *Nicaragua* v. *United States* case—concerning intervention under Article 63—neither Nicaragua nor the United States had strong objections to intervention by El Salvador. Still, the Court considered the application to be inadmissible. In the *Territorial and Maritime Dispute* case, both Nicaragua and Colombia 'recognize[d] the existence of Costa Rica's interest of a legal nature in at least some areas claimed by the Parties to the main proceedings'.[46] The Court nonetheless rejected the application.

For sure, the Court's margin of appreciation is objectively different under Articles 62 and 63 because the respective conditions for intervention established by these provisions are different. 'Article 62, paragraph 2, according to which "[it] shall be for the Court to decide upon this request", is markedly different from Article 63, paragraph 2, which clearly gives certain States "the right to intervene in the proceedings" in respect of the interpretation of a convention to which they are parties'.[47] The conditions for intervention under Article 63 being less stringent, this type of intervention should be more easily admitted. As a matter of terminology, the distinction between, on the one hand, 'the application for permission to intervene' under Article 62 and, on the other hand, 'the declaration of intervention' under Article 63 accounts for this difference of conditions.[48] Moreover, while Article 62, paragraph 2 makes clear that '[i]t shall be for the Court to decide upon this request', there is no such mention in Article 63. However, such differences do not annihilate the Court's *power to decide on the admissibility*

[43] *Request for Interpretation of the Judgment of 15 June 1962 in the* Case concerning the Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Judgment, ICJ Reports 2013,* pp. 295–304, paras 31–57.

[44] Even if Article 84 of the Rules uses a distinct terminology—'whether an application for permission to intervene under Article 62 of the Statute *should be granted*, and whether an intervention under Article 63 of the Statute is *admissible*', there is no difference in the nature of the exam made by the Court.

[45] See Sect. 2.2 above.

[46] *Nicaragua* v. *Colombia* (Application by Costa Rica to Intervene), *supra* note 3, p. 367, para 65.

[47] *Nicaragua* v. *Colombia* (Application by Honduras to Intervene), *supra* note 3, p. 434, para 36.

[48] This distinction is maintained in all the relevant articles of the Rules (see Articles 82–85).

of the requests to intervene. Consequently, 'the fact that intervention under Article 63 of the Statute is of right is not sufficient for the submission of a "declaration" to that end to confer *ipso facto* on the declarant State the status of intervener'.[49] The very fact that the Court did not allow El Salvador's intervention under Article 63 in *Nicaragua* v. *United States*[50] shows that the Court will determine in each case the admissibility of the request. Admission or rejection of intervention is then decided by the Court by a judgment or an order. This is all but logical: intervention is no more founded on the subjective appreciation of the would-be intervener than it is on that of the parties.

Even downgraded, opposition to intervention by the parties, expressed under the form of a negative conclusion as to the fulfilment of the objective requirements, does nonetheless retain some relevance: 'opposition [to an intervention] of the parties to a case is, though very important, no more than one element to be taken into account by the Court'.[51] It remains unclear however on what bases and to what extent the parties' attitude should influence the Court's assessment of the admissibility of the request for intervention. Apart from the fact that the Rules of the Court reserve a different procedural treatment to unopposed applications,[52] it must also be noted that, to the exception of Nicaragua's application in *El Salvador/Honduras*, in the other cases when the Court declared admissible applications for permission to intervene, there was no objection from the Parties to the dispute.[53] Though not decisive, the absence of an objection from the parties to the main case certainly facilitates the acceptance of intervention.[54]

However, this raises a question as to whether the Court has a faculty not to allow intervention, even when the statutory conditions are met?[55] Some of its pronouncements tend to suggest that admission of intervention does not solely rest on the objective appreciation of the statutory conditions. To found its decision, the Court also refers to the principle of the sound administration of justice:

[49] *Whaling* (Declaration of Intervention by New Zealand), *supra* note 7, p. 5, para 8.

[50] See Sect. 2.2 above.

[51] *El Salvador/Honduras* (Application by Nicaragua to Intervene), *supra* note 1, p. 133, para 90, quoting *Libya/Malta* (Application by Italy to Intervene), *supra* note 7, p. 28, para 46.

[52] See Article 84, paragraph 2 of the Rules; see also note 6 above.

[53] The interventions admitted under Article 62 were: *Land and Maritime Boundary between Cameroon und Nigeria, Application by Equatorial Guinea to Intervene, Order of 21 October 1999, ICJ Reports 1999*, pp. 1033–1034, paras 9–10; *Jurisdictional Immunities* (Application by Greece to Intervene), *supra* note 7, p. 496, para 6. New Zealand's intervention under Article 63 in the Whaling case was not objected to either by Australia or Japan (*Whaling* (Declaration of Intervention by New Zealand), *supra* note 7, p. 8, paras 16–17 and p. 9, para 19).

[54] Criticizing the influence upon the Court of the attitude of the parties, see *Nicaragua* v. *Colombia* (Application by Honduras to Intervene), *supra* note 3, Dissenting Opinion of Judge Donoghue, pp. 490–491, para 56.

[55] In the same vein, see also Palchetti (2002), p. 152.

> the Court 'does not consider paragraph 2 [of Article 62] to confer upon it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy' [. . .]. It is for the Court, responsible for safeguarding the proper administration of justice, to decide whether the condition laid down by Article 62, paragraph 1, has been fulfilled.[56]

The principle of sound administration of justice is essentially procedural in scope.[57] The reference to it may be understood as a confirmation of the fact that the Court admits or rejects intervention not only on admissibility grounds, and thus gives weight to the complaints according to which, when it comes to intervention, the Court exercises a creeping discretionary power. As Judge Abraham put it,

> It is one thing, however, to say that it falls to the Court to determine whether the condition is met, but it would be another thing to say that, even if it is met, the Court could still refuse to allow the intervention on a discretionary basis. [. . .] From that point of view, I do not see how the Court's power can be termed 'discretionary' (policy considerations do not enter into it); the third State has a right to intervene so long as it demonstrates that the conditions (or condition) for the exercise of that right are (is) met.[58]

The reference to the sound administration of justice can only be understood if it is accepted that the main function of intervention is the informative, and not the protective one. The main purpose of intervention would then indeed be the Court's being able to decide a case on the basis of all available information, and not the putative right of a third State to protect its interests. Accordingly, the Court can best exercise its jurisdiction on the merits if informed of aspects of law and fact by the would-be intervener. The right of States to intervene under Article 62 has mutated into a right for the Court to be fully informed of the all relevant aspects of law and fact, even the peripheral one.

In this respect, the preliminary proceedings on the admissibility of intervention are sometimes enough to fulfil that purpose. The Court considers at their outset that it is sufficiently informed of the third States' interests possibly affected, and no longer requires their assistance during the merits phase. This is the puzzling conclusion which can be drawn from the treatment reserved to Costa Rica's request for intervention:

[56] *Nicaragua* v. *Colombia* (Application by Honduras to Intervene), *supra* note 3, p. 434, para 36, quoting *Tunisia*/*Libya* (Application by Malta to Intervene), *supra* note 7, p. 12, para 17. See also *Nicaragua* v. *Colombia* (Application by Costa Rica to Intervene), *supra* note 3, p. 358, para 25.

[57] See Kolb (2013), pp. 1169–1180; see also Miron (2016), p. 374.

[58] *Nicaragua* v. *Colombia* (Application by Honduras to Intervene), *supra* note 3, Dissenting Opinion of Judge Abraham, p. 450, para 12. See also *Libya*/*Malta* (Application by Italy to Intervene), *supra* note 7, p. 12, paras 17–18.

> The evidence required from the State seeking to intervene cannot be described as restricted or summary at [the admissibility] stage of the proceedings, because, essentially, the State must establish the existence of an interest of a legal nature which may be affected by the decision of the Court. [. . .] This does not prevent the Court, if it rejects the application for permission to intervene, from taking note of the information provided to it at this stage of the proceedings.[59]

Thus, though clearly upheld in theory, the difference between the objective appreciation of statutory conditions and the existence of a discretionary power is obscured in practice by the ambiguity of the statutory conditions for intervention, which the Court has done little if anything to dispel.

3 The Substantive Conditions for the Admissibility of Intervention

Article 63 only requires from the would-be intervener to be a party to the convention whose construction is in question in the principal case. These two preliminary conditions can easily be assessed on an objective basis and their assessment has not given rise to any debate. By contrast, Article 62 of the Statute requires from the would-be intervener to establish 'an interest of a legal nature which may be affected by the decision' in the main case. This is the only preliminary condition set out in the Statute, but being a very vague one, it is also open to multiple interpretations. Nicaragua's cases focused on this aspect, but little light has come out of them (Sect. 3.1). In addition, the Rules and the Court's case-law provide for supplementary requirements. They mainly relate to the object of the envisaged intervention and aim at keeping intervention, as an incidental proceeding, within the bounds of the main case. These conditions apply equally to intervention under Articles 62 and 63 of the Statute (Sect. 3.2).

3.1 The Strategy of Avoidance in Defining the Concept of 'Interest of a Legal Nature Which May Be Affected'

The Court's case-law reveals its reluctance for defining both the concept of interest a legal nature and the threshold at which this interest might be affected. In fact, at present, it is even difficult to assess whether these are two cumulative conditions for the admissibility of intervention or rather a single one. The Court treats them together, as if they were a single condition, and this (absence of) methodology is puzzling. Indeed, on the conceptual level, the first element should be decided on the

[59] *Nicaragua* v. *Colombia* (Application by Costa Rica to Intervene), *supra* note 3, p. 363, paras 49–51.

basis of objective parameters, amenable for a definition in general terms, while the second should be purely circumstantial, a question of fact, depending on the particular circumstances of a case. The Court nonetheless combines arguments of fact and law in assessing the two aspects. The decisions on intervention in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, on the one hand, and in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, account for this strategy of avoidance of the Court.

3.1.1 The Court's Refusal to Positively Define the Interest of a Legal Nature

With this reservation in mind, it appears that the interest of a legal nature is defined in a negative way, by distinguishing it from germane concepts, such as legal right or legal claim. In its older decisions, the Court distinguished the *legal interest* for the purposes of Article 62 from the *legal right*—[60] a position all the more logical that the Court maintains it cannot pronounce on the legal rights of the third states, be they interveners or not[61]:

> In order to be permitted to intervene, a State does not have to show that it has rights which need to be protected, but merely an interest of a legal nature which may be affected by the decision in the case.[62]

However, the Court provided no criteria for distinguishing these two germane concepts, though it would have been all the more useful that, in other cases, the Court used those terms interchangeably.[63] The adjective 'legal' suggests that this interest is protected under international law. The State seeking to intervene must thus define its interests by reference to rules of international law. At the same time, it does not have to prove in a definitive manner their existence and scope (in which

[60]This difficult distinction goes beyond the question of intervention in contentious proceedings. It was for instance one of the touchstones of codification of the law of responsibility (see Nolte 2002).

[61]See Sect. 3.2 below.

[62]*El Salvador/Honduras* (Application by Nicaragua to Intervene), *supra* note 1, p. 129, para 87.

[63]This is particularly the case in relation to standing (in French: *intérêt à agir*): see *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, pp. 18–19, paras 4–8 and p. 22, para 14. Later, the Court abandoned this restrictive approach, and no longer requires from States to prove the existence of a subjective right in order to be recognize their standing: 'All the other States parties have a *common interest* in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties 'have a *legal interest*' in the protection of the rights involved (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, ICJ Reports 1970*, p. 32, para 33). These obligations may be defined as 'obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case' (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, ICJ Reports 2012*, p. 68, para 449—italics added).

case, the mere interests would become legal rights). Thus, Charles de Visscher defined the legal interest as *entitlement*:

> Invoquer un intérêt juridique c'est se réclamer à des fins juridiques d'un titre susceptible d'atteindre de telles fins, sans que le bien-fondé en droit de ce titre s'en trouve pour autant préjugé.[64]

From this perspective, the 'legal claims' amount to 'interests' for the purposes of Article 62, providing that their validity or the soundness of their merits remains to be ascertained.[65] In its more recent decisions, the Court embraced this point of view. This is particularly clear in the *Territorial and Maritime Dispute* case:

> The State seeking to intervene as a non-party therefore does not have to establish that one of its rights may be affected; it is sufficient for that State to establish that its interest of a legal nature may be affected. Article 62 requires the *interest relied upon by the State seeking to intervene to be of a legal nature, in the sense that this interest has to be the object of a real and concrete claim of that State*, based on law, as opposed to a claim of a purely political, economic or strategic nature.[66]

If the *legal interest* is framed as a *claim* based on law, then the determination of general points of law is not enough for purposes of Article 62. The interest under Article 62 cannot be a *general interest*.[67] In its order on intervention by Malta in *Tunisia/Libya* excluded that the interest could rest on the argument that 'the resulting judgment might form an important precedent as a subsidiary means for the ascertainment of the law'.[68] This is a reasonable approach, on at least two grounds:

– First, a contrary position would virtually open the gate of intervention to all States (since they all have an interest to the determination of the rule of law opposable to them);

[64]De Visscher (1966), p. 63.

[65]In the same vein, Palchetti explains that '[a] state seeking to intervene under Article 62 has to specify the content of its legal interest with reference to a given claim. In the cases so far submitted to the Court the interest has been mainly identified with specific rights or titles that the states seeking to intervene claimed to possess against the parties to the dispute' (2002, p. 144).

[66]*Nicaragua* v. *Colombia* (Application by Costa Rica to Intervene), *supra* note 3, pp. 358–359, para 26 (italics added). See also *Nicaragua* v. *Colombia* (Application by Honduras to Intervene), *supra* note 3, p. 434, para 37. Judge Donoghue did not entirely subscribe to this understanding: 'The Court today appears to suggest that an "interest of a legal nature" must be framed as a "claim" of a legal right. The focus on claims may flow from a body of jurisprudence derived from maritime claims. Nonetheless, although a generalized interest in the content of international law has been found to be insufficient to comprise an "interest of a legal nature", I do not rule out the possibility of a third State demonstrating an "interest of a legal nature" without framing it as a "claim" of a legal right' (*ibid*., Dissenting Opinion of Judge Donoghue, p. 476, fn 1).

[67]See also Queneudec (1995), pp. 419–420. This distinguishes the legal interest for the purposes of intervention from standing based on the *common* interest for the enforcement of *erga omnes* obligations (see note 63 above).

[68]*Tunisia/Libya* (Application by Malta to Intervene), *supra* note 7, p. 11, para 16 and p. 17, para 29.

– Second, intervention under Article 63 of the Statute is the best vehicle for third-states to develop points of law before the Court. Considering however that Article 63 is restricted to the construction of multilateral conventions—a vestige of an epoch where international law was considered to be the exclusive product of the will of the States—it cannot be invoked in respect to the determination of rules of customary law. This limitation in Article 63 of the Statute obliges States to mould their application to fit the requirements of Article 63.[69]

To overcome these paradoxes, some authors propose a distinction between 'on the one hand, an interest of "general nature" to the interpretation of conventions or rules of general international law and, on the other hand, an interest of a legal nature (as defined above) where the judgment may have a direct bearing'.[70] Indeed, as P. Palchetti underlined, 'it does not appear reasonable that views about general points of law in issue before the Court might be presented only by those states which can claim a specific interest in the dispute. This the more so since there are cases in which it is clear from the outset that the actual point in issue before the Court is represented not so much by the solution of a specific dispute as by the Court's pronouncement about the questions of law involved'.[71] Again, the informative function of intervention overcomes the protective one.

The application *in concreto* of this framework proved however highly unreliable. In the *Territorial and Maritime Dispute* case, Honduras defined its legal interest by reference to the bilateral treaty concluded with Colombia, which recognized certain maritime rights to it within the area to be delimited. However, the Court did not consider this entitlement to be enough to allow intervention, on account that this treaty was *res inter alios acta* to Nicaragua and could not constitute the basis of the Court's decision.[72]

Costa Rica defined its entitlement in the area to be delimited by reference to general international law, for which no issue of opposability to the parties could arise. But Costa Rica also insisted that its interest went beyond the general interest for the determination of the legal rules (which in 2011 were pretty stabilized after the 2009 judgment in the *Black Sea* case) and that it had a more concrete interest in the application of those general rules to an area where it had entitlements. The

[69]See Greece's intervention: '[I]n its written observations, Greece also expresses its wish to inform the Court "on Greece's approach to the issue of State immunity, and to developments in that regard in recent years"; and whereas Greece does not present this element as indicating the existence of an interest of a legal nature, but rather as providing context to its Application for intervention' (*Jurisdictional Immunities* (Application by Greece to Intervene), *supra* note 7, p. 499, para 18). However, most of Greece's observation as an intervenor related to ascertaining the existence of some rules of customary law (like the existence of a private right to compensation for human rights violations and the exception to State immunity in case of violations of norms of jus cogens: see *Written Statement of the Hellenic Republic*, 3 August 2011).

[70]Forlati (2014), p. 200.

[71]Palchetti (2002), p. 162. See also Wolfrum (1998), p. 428.

[72]*Nicaragua* v. *Colombia* (Application by Honduras to Intervene), *supra* note 3, p. 444, paras 72–73.

argument was not accepted: without denying or positively acknowledging the existence of Costa Rican interests, the Court chose to decide on the basis of the requirement that the interest must be at risk of being affected.[73] And on this point, it returned to a very high threshold, which it had applied in the 1980–1990.

3.1.2 A Sophistic Appreciation of the Risk of Being Affected

The interests of the third-State may be affected if they are part of the subject-matter of the dispute submitted by the parties (in which case, the intervener is akin though not identical to the indispensable party according to the *Monetary Gold* principle). At the same time, the interest cannot be affected if the third-State is protected by the relative effect of the *res judicata*. These are the parameters of the sophism used by the Court to determine the risk. It must be noted that they are general and abstract, whereas one would expect the risk for the interest to be affected to be determined on a circumstantial, factual basis.

In *El Salvador/Honduras*, the Court insisted upon the difference between the risk for the interest to be affected and the *Monetary Gold* hypothesis,[74] establishing that the threshold for the first one is lower than that of the second:

> a State which considers that its legal interest may be affected by a decision in a case has the choice, to intervene or not to intervene; and if it does not, proceedings may continue, and that State is protected by Article 59 of the Statute *(I.C.J. Reports* 1984, p. 26, para. 42). The Court's reply in the *Monetary Gold* case to the argument addressed to it was as follows:
>
> "Albania has not submitted a request to the Court to be permitted to intervene. In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania." *(Loc. cit.,* p. 32.).
>
> If in the present case the legal interests of Nicaragua would form part of "the very subject-matter of the decision", as Nicaragua has suggested, this would doubtless justify an intervention by Nicaragua under Article 62 of the Statute, which lays down a less stringent criterion.[75]

[73] *Nicaragua* v. *Colombia* (Application by Costa Rica to Intervene), *supra* note 3, p. 358, para 26.

[74] A preliminary question would be to assess whether the *Monetary Gold* principle can be applied outside the situations where the subject-matter of the dispute is a question of responsibility of a State absent from proceedings 'as a precondition for ruling on the responsibility of the Respondent' (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Judgment of 5 October 2016*, Separate opinion of Judge Tomka, para 38). In *El Salvador/Honduras*, no question of responsibility arose and the reference to the *Monetary Gold* principle was not obvious. In the *Jurisdictional Immunities* case, where questions of responsibility arose, Germany refrained from questioning the legality of the Greek judicial decisions and the Court considered that different sets of rules applied to their enforcement (*Jurisdictional Immunities* (Application by Greece to Intervene), *supra* note 7, p. 147, para 114).

[75] *El Salvador/Honduras* (Application by Nicaragua to Intervene), *supra* note 1, p. 116, paras 54 and 56.

The Court thus distinguished between the legal interest under Article 62 and the subject-matter of the decision. In the same vein, the Court clarified that:

> the interest of a legal nature to be shown by a State seeking to intervene under Article 62 is not limited to the *dispositif* alone of a judgment. It may also relate to the reasons which constitute the necessary steps to the *dispositif*.[76]

This wording is doubly curious: first, the Court makes reference to the *dispositif* of the judgment on the merits. But this is a chronological impossibility, since the application for permission to intervene predates the judgment. A reference to the claims of the parties (the *petita*) to which the *dispositif* responds in principle would be more apposite. Moreover, the Court uses the reference to the *dispositif* in order to define the interest, but it is more probable for the *dispositif* to *affect* the interest rather than define it. As Judge Donoghue put it in her dissent in the *Nicaragua* v. *Colombia* case:

> [T]he requirement that the third State's interest of a legal nature "may be affected" does not require the applicant to predict the decision of the Court on the merits, but necessarily requires the would-be intervener "to show in what way that interest may be affected" [. . .]. This suggests that it must persuade the Court of a sufficient connection between the interest that it asserts and an eventual decision relating to the subject-matter of the case. What remains unclear, however, is precisely what sort of nexus is required to satisfy the requirement that the interest of a legal nature "may be affected".[77]

The interest in Article 62 is therefore linked to the subject-matter, without being identical to it. This contrast may be subtle, but remains necessary not to enlarge too much the scope of the *Monetary Gold* principle and thus unduly obstruct the jurisdiction of the Court. It was also necessary in order not to restrict intervention under Article 62 to the hypothesis of the indispensable intervener.

The real difficulty in establishing that the interest is at risk of being affected stems from the fact that the Court denies it whenever third-States' interests are protected by Article 59 of the Statute (the relative effect of *res judicata*). This excessively formalistic threshold was restated in *Nicaragua* v. *Colombia*:

> [T]o succeed with its request, Costa Rica must show that *its interest* of a legal nature in the maritime area bordering the area in dispute between Nicaragua and Colombia *needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute*.[78]

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[76] *Nicaragua* v. *Colombia* (Application by Honduras to Intervene), *supra* note 3, p. 434, para 38, quoting *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application by the Philippines for Permission to Intervene, Judgment, ICJ Reports 2001*, p. 596, para 47 (hereinafter '*Indonesia/Malaysia* (Application by the Philippines to Intervene)'). See also *Nicaragua* v. *Colombia* (Application by Costa Rica to Intervene), *supra* note 3, p. 359, para 26.

[77] *Nicaragua* v. *Colombia* (Application by Honduras to Intervene), *supra* note 3, Dissenting Opinion of Judge Donoghue, p. 476, para 16.

[78] *Nicaragua* v. *Colombia* (Application by Costa Rica to Intervene), *supra* note 3, p. 372, para 87—italics added.

In this case, the Court abandoned the precedent established in relation to Equatorial Guinea's intervention *Cameroun* v. *Nigeria* case, where it considered that 'in the case of maritime delimitations where the maritime areas of several States are involved, the protection afforded by Article 59 of the Statute may not always be sufficient'.[79] While the Court limited the scope of the judgment on the merits to an area where the interests of all the third States, interveners or not, were unaffected, that possibility had not been an obstacle for the admission of intervention.[80] Indeed, the Court's response to Honduras' and Costa Rica's application for permission to intervene marks a return to the conservative, extremely prudential position it had already adopted in the *El Salvador*/*Honduras* case, where the existence of overlapping claims in the area to be delimited was not enough to establish that the interest of a third State might be affected.[81] One may wonder if there is any possibility left for third-States to intervene in maritime delimitation cases, after the 2011 judgments in *Nicaragua* v. *Colombia*.

3.2 Conditions as to the Object of Intervention

The 1978 revision of the Rules introduced further requirements in respect to intervention.[82] An application for permission to intervene under Article 62 of the Statute 'shall set out [. . .] the precise object of the intervention' (Article 81, paragraph 2b of the Rules), whereas a declaration under Article 63 'shall contain [. . .] b) identification of the particular provisions of the convention the construction of which it considers to be in question; c) a statement of the construction of those provisions for which it contends' (Article 82, paragraphs 2 b) and 2c). Both requirements aim at greater specificity of the request for intervention. Logically, these two should not be requirements for the admissibility of the application to intervene, since they address the limits of intervention itself and the legal consequences which the Court could trigger in the judgment on the merits. As such, they suppose the application is admissible. The Court nonetheless addresses them at the preliminary stage of the admissibility. Accordingly, the scope of intervention is clearly articulated and bounded by the judgment on admissibility. Thus, in *El Salvador*/*Honduras* case, the Chamber insisted that Nicaragua 'should be permitted to intervene but solely in respect of the Chamber's consideration of the legal régime

[79] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports 2002*, p. 421, para 238.

[80] See the critics by Judge Donoghue in its Dissenting Opinion in *Nicaragua* v. *Colombia* (Application by Costa Rica to Intervene), *supra* note 3, pp. 480–481, para 22–23.

[81] *El Salvador*/*Honduras* (Application by Nicaragua to Intervene), *supra* note 1, p. 124, para 77 quoted in *Nicaragua* v. *Colombia* (Application by Costa Rica to Intervene), *supra* note 3, p. 371, para 85.

[82] Miron and Chinkin (2018), pp. 1345–1346.

of the maritime spaces within the Gulf of Fonseca, and to participate in the proceedings in the case in accordance with Article 85 of the Rules of Court.'[83]

This shows again the prudential approach in respect to intervention. By the addition of these requirements in the Rules, the Court seeks to control upstream that intervention remains within the bounds of the main case. From this point of view, these requirements reflect the incidental nature of intervention.

Leaving aside the latest decisions in *Nicaragua* v. *Colombia* which tend to confuse the purposes of intervention—vague and open-ended—[84] with the 'precise object' requirement,[85] the other Nicaragua's cases brought nonetheless useful clarifications in this respect. They can be summed up as follows:

3.2.1 Intervention Must Not Introduce a New Dispute

The Chamber in *El Salvador*/*Honduras* made clear in its judgment on the admissibility of intervention by Nicaragua that these proceeding must not introduce a new dispute. This would be at odds with their incidental nature:

> An incidental proceeding cannot be one which transforms that case into a different case with different parties.[86]

This would also run contrary to the functions of intervention:

> Intervention under Article 62 of the Statute is for the purpose of protecting a State's "interest of a legal nature" that might be affected by a decision in an existing case already established between other States, namely the parties to the case. It is not intended to enable a third State to tack on a new case, to become a new party, and so have its own claims adjudicated by the Court. A case with a new party, and new issues to be decided, would be a new case. The difference between intervention under Article 62, and the joining of a new party to a case, is not only a difference in degree; it is a difference in kind. As the Court observed in 1984, "There is nothing in Article 62 to suggest that it was intended as an alternative means of bringing an additional dispute as a case before the Court – a matter dealt with in Article 40 of the Statute – or as a method of asserting the individual rights of a State not a party to the case".[87]

The logical consequence stemming from the prohibition to introduce a new dispute is that 'there is [no] requirement for the definition of a dispute in prior negotiations before an application can be made for permission to intervene'.[88]

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[83] *El Salvador*/*Honduras* (Application by Nicaragua to Intervene), *supra* note 1, p. 136, para 103. See also p. 125, para 79.

[84] See above, Introduction.

[85] As for instance: 'the *precise object* of the request to intervene certainly consists in *informing* the Court of the interest of a legal nature' (*Nicaragua* v. *Colombia* (Application by Costa Rica to Intervene), *supra* note 3, p. 360, para 33; see also p. 363, para 49).

[86] *El Salvador*/*Honduras* (Application by Nicaragua to Intervene), *supra* note 1, p. 134, para 98.

[87] *Ibid.*, pp. 132–133, para 97 quoting *Libya*/*Malta* (Application by Italy to Intervene), *supra* note 7, p. 23, para 37.

[88] *El Salvador*/*Honduras* (Application by Nicaragua to Intervene), *supra* note 1, pp. 113–114, para 51.

3.2.2 Intervention Must Not Seek to Adjudge Claims of the Intervener

In the same case, the Chamber endorsed the Court's finding in the 1984 Judgment on the *Application of Italy for permission to intervene in the case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, according to which the Application 'could not be granted because, inter alia, to give effect to it "the Court would be called upon [. . .] to determine a dispute, or some part of a dispute, between Italy and one or both of the principal Parties".'[89] Put it differently, intervention must not seek to and cannot result in adjudging claims of the intervener. The aim of intervention is to protect the entitlements of the third State and not to provide their definitive recognition nor to adjudge them.[90]

This limitation reflects the distinction between legal rights and legal interests, defined as claims or entitlements.[91] Were the Court to make binding determinations over that interest in its judgment on the merits, the interest would then definitely mutate into a right/obligation of the intervener and would make the judgment on the merits binding on it. This would be unacceptable for intervention as a non-party. However, it is not excluded for intervention as a party (this is at least the conclusion which could be drawn from the judgment on Honduras' request to intervene:

> [i]f it is permitted by the Court to become a party to the proceedings, the intervening State may ask for rights of its own to be recognized by the Court in its future decision, which would be binding for that State in respect of those aspects for which intervention was granted, pursuant to Article 59 of the Statute.[92]

There is thus a contradiction between the conditions for admissibility of intervention in general, which precisely require from States not to seek to adjudge claims, and the status of intervener as a Party, which will precisely lead the Court to adjudge claims. The only way to resolve this contradiction will be to clearly distinguish between intervener and parties to the case.

Moreover, intervention as a party is hard to reconcile with the incidental nature of intervention

> An incidental proceeding cannot be one which transforms that case [already before the Court] into a different case *with different parties*.[93]

[89] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, Merits, ICJ Reports 1992*, p. 114, para 51 (hereinafter '*El Salvador/Honduras* (Merits)') quoting *Libya/Malta* (Application by Italy to Intervene), *supra* note 7, p. 20, para 31.

[90] See Palchetti (2002), pp. 148–149.

[91] See Sect. 3.1.1 above.

[92] *Nicaragua v. Colombia* (Application by Honduras to Intervene), *supra* n. 3, p. 432, para 29.

[93] *El Salvador/Honduras* (Application by Nicaragua to Intervene), *supra* n. 1, p. 134, para 98, emphasis added.

4 The Effect of the Judgment on the Merits and the Status of the Intervener

The status of the intervener is a question which has been debated for long and whose answer remains yet to be clearly articulated.[94] Absent any indication in the Statute[95] and the Rules, the Chamber in *El Salvador/Honduras*, seised the first case of intervention admitted under Article 62 of the Statute, it had the cumbersome mission of clarifying, or rather establishing, the effect of the judgment on the merits and the status of the intervener. The Chamber relied on nuances, at the expense of clarity. Curiously, it first determined the status (or statuses) of the intervener, and only afterwards determined the effect of the judgment upon it. Thus appeared the newly-minted distinction between intervener as a party and intervener as a non-party:

> [A] State which is allowed to intervene in a case, does not, by reason only of being an intervener, become also a party to the case. It is true, conversely, that, provided that there be the necessary consent by the parties to the case, the intervener is not prevented by reason of that status from itself becoming a party to the case.[96]

In fact, through this distinction, the Court sought to mitigate its finding of no jurisdictional link,[97] by considering that States become parties to the proceedings only if there is consent to the Court's jurisdiction:

> Those States are the "parties" to the proceedings, and are bound by the Court's eventual decision because they have agreed to confer jurisdiction on the Court to decide the case, the decision of the Court having binding force as provided for in Article 59 of the Statute. Normally, therefore, no other state may involve itself in the proceedings without the consent of the original Parties.[98]

[94] See Lagrange (2005), pp. 65–70.

[95] Some indications could however be found in the *travaux préparatoires*. Indeed, as R. Wolfrum underlined: 'Comparing article 62 of the Statute of the Permanent Court of International Justice and the equivalent provision of the Statute of the International Court of Justice (ICJ), one major difference becomes evident. Whereas, under the Statute of the Permanent Court of International Justice, the intervening State intervenes 'as a third party', it does not do so under the Statute of the International Court of Justice. These words were deleted from the provision when, in 1945, a committee of jurists prepared a draft statute for the International Court of Justice. In assessing such a change, it should be noted that the 1920 French version of the Statute of the Permanent Court of International Justice did not contain these words and that, accordingly, the present version of article 62 of the Statute of the International Court of Justice reflects the French version of Article 62 of the Statute of the Permanent Court of International Justice. The report on the draft statute of the ICJ to the San Francisco Conference stated that the deletion of the words 'as a third party' were not intended to change the meaning of Article 62 of the Statute.' (Wolfrum 1998, p. 434, footnotes omitted).

[96] *El Salvador/Honduras* (Application by Nicaragua to Intervene), *supra* note 1, pp. 134–135, para 99.

[97] See Sect. 2.2 above.

[98] *El Salvador/Honduras* (Application by Nicaragua to Intervene), *supra* note 1, p. 133, para 95.

This distinction has been (un)successfully perpetuated ever since. Successfully because the full Court recalled it *inter alia* in *Nicaragua* v. *Colombia*: 'the status of intervener as a party requires, in any event, the existence of a basis of jurisdiction as between the States concerned, the validity of which is established by the Court at the time when it permits intervention.'[99] Unsuccessfully because the Court has never authorized intervention as a party (though Honduras sought this status in *Nicaragua* v. *Colombia*).[100] In his Dissenting Opinion in that case, Judge Abraham considered this distinction highly confusing

> In reality, it follows from that Judgment and from the Judgment on the merits delivered by the same Chamber in the same case [El Salvador/Honduras, Nicaragua intervening] [. . .] that a third State which is allowed to intervene as a party does not acquire the status of intervener on receiving that authorization, but purely and simply that of a party. From that moment, the proceedings are no longer between two parties, but between three, and there is no intervener. In short, the third State uses the application for permission to intervene as a way to join the proceedings, not as an intervener — which is the usual object of such an application —, but as a party.[101]

The perpetuation of this distinction is not only confusing, but also damaging. It is because the Chamber distinguished the intervener from the Parties that it also asserted the absence of a binding effect of the judgment on the former. Indeed, the Court confined the binding effect to the *res judicata* hypothesis, and considered that Article 59 of the Statute proscribes any such effect towards a non-party:

> The terms on which intervention was granted, as stated in paragraph 102 of the 1990 Judgment, were that Nicaragua would not, as intervening State, become party to the proceedings. The binding force of the present Judgment for the Parties, as contemplated by Article 59 of the Statute of the Court, does not therefore extend also to Nicaragua as intervener.[102]

This conclusion could and has been criticized on more than one account.[103] First, it is pure fiction, as *El Salvador*/*Honduras* case has shown. Having decided that the legal régime of the Gulf of Fonseca is that of a condominium,[104] meaning that the sovereignty rests within the three riparian States, it is hardly conceivable that this

[99] *Nicaragua* v. *Colombia* (Application by Honduras to Intervene), *supra* note 3, p. 432, para 28 and *Nicaragua* v. *Colombia* (Application by Costa Rica to Intervene), *supra* note 3, p. 361, para 38. See also *Indonesia*/*Malaysia* (Application by the Philippines to Intervene), *supra* note 76, pp. 588–589, paras 31–36.

[100] *Nicaragua* v. *Colombia* (Application by Honduras to Intervene), *supra* note 3, p. 429, para 18.

[101] *Nicaragua* v. *Colombia* (Application by Honduras to Intervene), *supra* note 3, Dissenting Opinion of Judge Abraham, p. 452, para 18.

[102] *El Salvador*/*Honduras* (Merits), *supra* note 89, p. 629, para 421. See quote *ibid*., para 424.

[103] See the critics by Judge Oda in its Declaration in *El Salvador*/*Honduras* (Merits), *supra* note 89, pp. 619–620 and by Judge *ad hoc* Torres-Bernárdez in its Separate Opinion in *ibid*., pp. 730–731, para 208.

[104] *El Salvador*/*Honduras* (Merits), *supra* note 89, p. 616, para 432. See also the conclusions of the Court in relation to the enforcement by Italy of the decisions of the Greek courts (*Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, ICJ Reports 2012*, p. 155, para 139, point 3).

finding had no effect on Nicaragua (which moreover was expressly referred to in the dispositif of the judgment).[105]

Second, the binding effect attaching to the Court's decisions cannot be reduced to the unique hypothesis of *res judicata*. Indeed, as noted by judge Torres-Bernárdez, '[i]ntervention under Article 63, for example, are non-party interventions and nevertheless the intervening State is under the obligation set forth in that Article'.[106] Later the Court asserted the binding effect of its orders prescribing provisional measures without any textual basis in the Statute.[107] The Statute of ITLOS rightfully provides in Article 31, paragraph 2 that:

> If a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party in so far as it relates to matters in respect of which that State Party intervened.

Finally, the absence of binding effect under Article 62 is unduly unrighteous for the Parties themselves. Admittedly, 'the Court was careful not to adopt a position in which "it would be admitting that the procedure of intervention under Article 62 would constitute an exception to the fundamental principles underlying its jurisdiction, [like] the principles of reciprocity and equality of States".'[108] However, the intervener enjoys procedural rights[109] and in practice intervention can also be disruptive of the balance between the Parties, especially if the intervener acts in the same interest as one of them.[110] Still, intervention comes at no risk for the third-State. Indeed, intervention is something more than a highly sophisticated form of *amicus curiae*.

Summing up, it cannot be denied that Nicaragua's cases brought a great contribution to the law on intervention. They clarified some of its important characteristics, both under Article 62 and 63 of the Statute. Among the most salient points:

- intervention, as an incidental proceeding, is dependent on the existence of a case on the merits;
- intervention is not based on the consent of the Parties (pre-existent or *ad hoc*); it is a case of statutory jurisdiction;
- the admissibility of intervention is established by the Court on an objective basis.

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[105] *El Salvador/Honduras* (Merits), *supra* note 89, p. 616, para 432.

[106] *El Salvador/Honduras* (Merits), *supra* note 89, Separate Opinion of Judge *ad hoc* Torres-Bernárdez, pp. 730–731, para 208.

[107] *LaGrand (Germany* v. *United States of America), Judgment, ICJ Reports 2001,* pp. 501–506, paras 98–109.

[108] *El Salvador/Honduras* (Application by Nicaragua to Intervene), *supra* note 1, p. 133, para 99, *Libya/Malta* (Application by Italy to Intervene), *supra* note 7, p. 22, para 35. In *El Salvador/Honduras*, the Chamber made clear that the intervener had no right to appoint an *ad hoc* judge (*ibid*., pp. 135–136, para 102).

[109] Such as the right to file pleadings and the right to be heard (both on issues of admissibility and on merits) (see Articles 84, 85 and 86 of the Statute).

[110] On these aspects, see Miron (2016), pp. 390–391.

However, Nicaragua's cases are also source of confusion. They left some space to parties' consent (or absence of objection), without providing guidance as to its weight. This leftover nourished the useless distinction between intervention as a party and as a non-party, which is source of great perplexity and complications and it is linked to the Court's denial of any binding effect of the judgment on the merits towards the intervener. These obscurities can hardly be settled by new judicial decisions. In this respect, a revision of the Rules appears more desirable and more fruitful.

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